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Supreme Court, U.S.
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No.

IN THE UNITED STATES SUPREME COURT

October Term, 1986

California Pacific Research, Inc.,
a Nevada Corporation,

Petitioner,

vs.

United States Postal Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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v.

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QUESTION PRESENTED FOR REVIEW

1. Whether there was substantial evidence to support the Respondent Postal Service's decisions that Petitioner falsely represented that its products will stop hair loss in balding men and will cause the regrowth of hair on bald heads and thereby had engaged in a scheme to obtain money or property through the mails my means of materially false representations in violation of 39 U.S.C. 3005.

LIST OF PARTIES

All parties to this proceeding are identified in the caption above.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	ii
Table of Contents	ii
Table of Authorities	iii
Official and Unofficial Reports of Opinions of Courts and Agencies	1
Statutes Involved	2
Statement of the Case	3
A. Introduction	3
B. Representations Made by Petitioner	8
1. Introduction	8
2. Testimony on the Respresentations	10
3. Product Efficacy	13

Page

Argument 15

A. Standard of Review 15

B. Evidence on the Representations 15

C. Evidence on Falsity 24

Appendix App.

TABLE OF AUTHORITIES

Cases

American Image Corp. v. USPS, 370 F. Supp. 964, 966 (SDNY, 1974) 15

Donaldson v. Read, 333 U.S. 178 (1948) 16

Franklin Supply Co. v. Tolman, 454 F.2d 1059, 1071 (9th Cir., 1971) 18

M.K.S. Enterprises v. USPS, 459 F. Supp. 1150, 1157 (EDNY, 1978) 16, 17, 19

Research Laboratories, Inc. v. United States, 167 F.2d 410, 416-7 (9th Cir., 1948) 28, 30, 31

Page

Simeon Management Corp. v. FTC, 579 F.2d 1137, 1143-44 (9th Cir., 1978) 30

Standard Oil Co. v. FTC, 577 F.2d 653, 659 (9th Cir., 1978) 18, 19

Universal Camera Corp. v. NLRB, 430 U.S. 474, 476 (1951) 15

USPS v. Stimpson, 515 F. Supp. 1149, 1151 (D. Fla., 1981) 27

Van Dyne Advertising Agency, Inc. v. USPS, 371 F. Supp. 1373, 1376 (SDNY, 1974) 17

Vibra-Brush Corp. v. Schafer, 152 F. Supp. 461 (SDNY, 1957) vacated on other grounds 256 F.2d 681 (2nd Cir., 1958) 16

Statutes

5 U.S.C. 706(2)(E) 3

21 U.S.C. 301, et seq. 28, 32

21 U.S.C. 321(p) 29

21 U.S.C. 355 29

	Page
28 U.S.C. 2154(1)	2
39 U.S.C. 3005	2, 4, 6, 32
Rules	
Supreme Court Rule 17	24, 33

OFFICIAL AND UNOFFICIAL REPORTS
OF OPINIONS OF COURTS AND AGENCIES

The United States Court of Appeals issued an unpublished decision on July 10, 1986, California Pacific Research, Inc. v. United States Postal Service, No. 85-1727.

The United States District Court for the District of Nevada issued an unpublished opinion on January 14, 1985, California Pacific Research, Inc. v. United States Postal Service, No. Civil R-83-172 BRT.

The Administrative Law Judge of the Postal Service issued an Initial Decision on April 9, 1982, In the Matter of the Complaint against New Generation, etc., P.S. Docket No. 11/152.

The Judicial Officer of the Postal Service issued a Postal Service decision on May 13, 1983, In the Matter of the

Complaint against New Generation, etc., P.S. Docket No. 11/152.

GROUNDS FOR THIS COURT'S JURISDICTION

a. The decision of the Court of Appeals for the Ninth Circuit was entered on July 10, 1986.

b. There were no requests for rehearing in the Court of Appeals or requests for orders extending the time for filing a Writ of Certiorari.

c. The statutory provision Petitioner believes confers jurisdiction of this Court is 28 U.S.C. 1254(1).

STATUTES INVOLVED

39 U.S.C. 3005(a) provides, in relevant part:

> Upon evidence satisfactory to the Postal Service that any person is engaged in a scheme or device for obtaining money or property through the mail by means of false representations, * * * the Postal Service may issue an order which -

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative to return such mail to the sender appropriately marked as in violation of this section ***; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

5 U.S.C. 706(2)(E) provides, in relevant part:

To the extent necessary for decision and when presented, the reviewing court shall * * * * -

(2) hold unlawful and set aside agency action, findings and conclusions found to be -

(E) unsupported by substantial evidence in a case subject to Sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute...

STATEMENT OF THE CASE

A. INTRODUCTION

This case originates with an Administrative Complaint filed in August, 1981 by the United States Postal Service seeking

an order to be issued against Petitioner pursuant to 39 U.S.C. 3005(a)(1) and (2) to stop Petitioner from receiving mail pertaining to its New Generation products and having the mail returned to the senders. Under the Statute, an order may issue which directs the return to sender of mail, and the non-payment of postal money orders or notes, and refund to remitters, when it appears, "upon evidence satisfactory to the Postal Service that (Petitioner) is engaged in conducting a scheme or device for obtaining money or property through the mails by means of false representations." 39 U.S.C. 3005.

The Administrative Complaint alleged that Petitioner here (Respondent in the Administrative proceeding) represented that its New Generation products "will stop hair loss in balding men" and "will cause the regrowth of hair on bald heads."

A hearing was held on the Complaint before an Administrative Law Judge on October 1 and 2, 1981 in San Francisco, CA. On the basis of the evidence submitted at the hearing and the briefs and arguments of the parties, the Administrative Law Judge issued his Initial Decision on April 9, 1982, finding that Petitioner represented that its products "will cause the regrowth of hair on bald heads" and that this representation was false in fact. The Administrative Law Judge found that the evidence did not support the Postal Service's contention that Petitioner represented its products will stop hair loss in balding men. The Administrative Law Judge concluded that Petitioner was engaged in a scheme to obtain money through the mail by means of false representations and recommended the issuance of the Order requested by the Postal Service.

Both parties appealed the Initial Decision to the Postal Service Judicial Officer. The Judicial Officer affirmed the Initial Decision with respect to the hair growth claim, but reversed the Initial Decision with respect to the hair loss claim and found that Petitioner did represent its products "will stop hair loss in balding men" and that this representation was false by a preponderance of the evidence. The Judicial Officer issued the orders requested by the Postal Service pursuant to 39 U.S.C. 3005. The parties agreed to a stay of those orders pending exhaustion of all appeals.

Petitioner filed a Complaint for Review in the United States District Court for the District of Nevada alleging that the Postal Service decision was not supported by substantial evidence. On January 14, 1985, the District Court granted

Petitioner's Motion for Summary Judgment concluding (App. p. 46) that:

> ... substantial evidence does not support the Judicial Officer's findings that: (1) New Generation represents it will stop excess hair loss in balding men; (2) New Generation represents it will cause regrowth of hair on bald heads; and (3) that these claims are false as a matter of fact.

Accordingly, the Postal Service Order was set aside.

The Postal Service appealed the District Court decision to the Court of Appeals for the Ninth Circuit. In the decision from which this Petition emanates, the Court of Appeals reversed the District Court holding (App., p. 19):

> Because there was substantial evidence to support the Postal Service's decision that appellee falsely represented that its products will stop excessive hair loss and cause regrowth of hair in men with male pattern baldness the Postal Service's administrative decision must be upheld.

B. Representations Made By Petitioner

1. Introduction

At the time of the filing of the Administrative Complaint, Petitioner marketed two hair care products, New Generation hair and scalp cleanser/conditioner and New Generation shampoo. As application to the issue here, the Administrative Complaint alleged that the products "will stop hair loss in balding men" and "will cause the regrowth of hair on bald heads."

The Administrative Complaint alleged that Petitioner's promotion of its products commenced with an advertisement in the Sacramento Bee newspaper on August 14, 1980. The advertisement was addressed to people who had an interest in baldness, and told them that Petitioner may have an unspecified answer for them. Interested persons were encouraged to call

Petitioner for more information or to watch an upcoming television program.

The Complaint further alleged that interested persons, upon contacting Petitioner, would receive certain materials, set forth at pages 4 - 6 of the April 9, 1982 Initial Decision. These materials consisted of reprints of newspaper articles appearing in publications of general circulation not authored by Petitioner, and a product order form. The materials generally discuss the background of Petitioner's president, how the products came to be developed, and user experience with the products. The materials also discuss male pattern baldness, the ingredients in the products, and the cleansing and conditioning performance characteristics of the products.

The materials also contain negative statements about both the Petitioner and the products.

2. Testimony On The Representations

At the Administrative Hearing, the Postal Service presented no witnesses with respect to the representations made by the materials. Petitioner presented the testimony of an expert in consumer marketing as well as several persons who had read the articles.

Dr. Carol Scott, at that time a Professor of Marketing at UCLA, testified that, in her expert opinion, the materials did not, when read in their entirety, represent that the products will stop hair loss in balding men or will cause the regrowth of hair on bald heads. She testified that the 1980 Sacramento Bee advertisement separated the general

populace from an "interested audience" because it required the reader to take an affirmative action, i.e., requesting information. Dr. Scott testified that this interested reader is not the ordinary, average person, but one who is a more sophisticated and discerning consumer who could read the materials at his or her own speed, would be likely to read all of the material, and would process the information in light of his or her experiences with baldness.

Using this audience as the appropriate target for Petitioner's materials, Dr. Scott testified that the materials are not persuasive in a commercial sense: They provide skeptical information on the products, and do not promise that the products will have any effect on baldness. Her expert conclusions were that the

materials did not represent that the products will stop hair loss in balding men or will cause the regrowth of hair on bald heads. Her expert conclusion was that the materials, read as a whole, do not make the representations alleged in the Complaint.

Several lay witnesses testified to the representations made to them by the materials. All of these witnesses were in the interested group defined by Dr. Scott. These witnesses, who included an attorney, a psychiatrist, an anesthesiologist and a dentist, all testified that the materials did not represent or suggest to them that the products will stop hair loss in balding men or cause the regrowth of hair on bald heads.

3. Product Efficacy

If the evidence supports the allegations of the Postal Service that the materials represent that the products will stop hair loss in balding men and will cause the regrowth of hair on bald heads, the question becomes whether those representations are false. The Postal Service offered one witness, Dr. Karl Kramer, a dermatologist, to testify that in his opinion the products would not stop hair loss in balding men or cause the regrowth of hair on bald heads.

Dr. Kramer testified that polysorbate 60, the chief ingredient in the hair and scalp cleanser/conditioner, would remove dihydrotestosterone (a hormone which is believed to be the cause of male pattern baldness), from the hair follicle where it exerts its effect. He also testified

that he was unaware of there being any placebo effect with baldness products. He testified that he did not know whether, as a matter of fact, the products would stop hair loss in balding men or cause the regrowth of hair on bald heads.

Seventeen product users testified that as a result of using the products, they either had a lessened hair fallout or had some hair regrowth after using Petitioner's products. In addition, photographs of nine witnesses, showing their scalps before and after using Petitioner's products were introduced into evidence. The after photographs showed an equal amount of hair, or more hair, than the before pictures.

ARGUMENT

A. The Standard of Review

The standard of review of this case is whether the Postal Service decision is supported by substantial evidence. This court held in Universal Camera Corp. v. NLRB, 430 U.S. 474, 476 (1951) that substantial evidence

> ... is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

B. Evidence on The Representations

In determining what representations are made in Petitioner's materials, the finder of fact is not to review them

> with a lawyer's eye to 'fine spun distinctions", but with an eye to their overall effect upon the average reader.

American Image Corp. v. USPS, 370 F. Supp. 964, 966 (S.D.N.Y., 1974); M.K.S.

Enterprises v. USPS, 459 F. Supp. 1180, 1187 (E.D.N.Y., 1978). Furthermore, the meaning of advertising representations must be determined from consideration of the advertisement in its totality, not merely selected excerpts thereof. Donaldson v. Read, 333 U.S. 178 (1948); Vibra-Brush Corp. v. Schafer, 152 F. Supp. 461 (S.D.N.Y., 1957) vacated on other grounds 256 F.2d 681 (2nd Cir., 1958).

The courts have recognized that the definition of "average reader" must be adjusted to the realities of each particular case, and that whether an advertisement contains a false representation must be determined by its impact on those to whom it is directed. Van Dyne Advertising Agency, Inc. v. USPS, 371 F. Supp.

1373, 1376 (S.D.N.Y., 1974). In M.K.S. Enterprises v. USPS, supra, 459 F. Supp. at 1187, the court held that:

> ... while there is in each advertisement language which in different contexts might support the agency's findings, when viewed as an integral part of each of these advertisements the same language yields a different meaning. Just as an advertiser may not avoid the prohibitions of 39 U.S.C. 3005 by artfully assembling from true statements as advertisement that as a whole is misleading, the Postal Service cannot invoke its authority under this section unless the overall effect of an advertisement is to mislead the ordinary consumer. (Emphasis in original)

Thus, consistent with the case law and the testimony of Petitioner's marketing expert, the representations made in the materials must be viewed through the eyes of the group to whom they are directed - those interested in baldness, not the ordinary, average consumer. Dr.

Scott's expert testimony confirmed by the reader witnesses, was that the materials, when read as a whole and in context, did not make the representations alleged in the Complaint.

The District Court found (App. p. 29):

> ...the Judicial Officer, presumably a highly educated attorney with great intellectual capacity, cannot assume that his perceptions reflect the average consumer's in relation to evaluating the advertising of a specific product. This is not to say that he cannot draw upon his own experience to determine the "natural and probable result of the use of advertising expressions." Standard Oil Co. v. FTC, 577 F.2d 653, 659 (9th Cir. 1978). But, where unopposed expert testimony is received on an issue best interpreted by an expert, and no reason appears to doubt the credibility of the witness, or the accuracy of the opinion, the fact testified to by the expert should be deemed established under the Federal Rules of Evidence. Franklin Supply Co. v. Tolman, 454 F.2d 1059, 1071, (9th Cir., 1971).

The District Court found that Dr. Scott was competent to testify to the

representations made by the materials (as did the Administrative Law Judge, Initial Decision, p. 7). The District Court also found that the testimony of the lay witnesses was erroneously ignored by the Postal Service. The Court found (App. p. 33) that:

> The Judicial Officer fails to note, however, that these four witnesses are all consumers who came to New Generation through the advertising materials in question. To reject their testimony entirely because they may be more sophisticated than the average New Generation consumer is to ignore the only testimony presented by persons actually responding to the advertising materials. The Judicial Officer simply cannot turn his back to actual consumer testimony and substitute instead his own opinion of how consumers would react. Standard Oil Co. v. FTC, supra; M.K.S. Enterprises v. USPS, supra.

The District Court also addressed the issue of the use of the word "will" in the Complaint (Op., p. 4). The

Complaint alleged that New Generation "will stop hair loss in balding men" and "will cause the regrowth of hair on bald heads" (see, Initial Decision, p. 2). In the District Court, the Postal Service contended that the use of the word "will" in the Complaint really meant "may". The District Court rejected the Postal Service argument that the use of the word "will" in the Complaint was merely semantical, and held that the Postal Service Complaint should be read as written.

After reviewing the testimony of Dr. Scott, the materials and the testimony of the lay witnesses, the District Court found that a reasonable mind would not find relevant evidence adequate to support the allegations made by the Postal

Service, and ruled that substantial evidence did not exist to support the Postal Service decision on the representations issue.

The Court of Appeals reviewed this matter de novo. In discussing the use of the word "will" in relation to the word "may", the Court stated (App., p. 12) that the District Court's distinction between the words "will" and "may" ignores the most logical reading of the Complaint. The Court stated (App. pp. 13-14) that

> The fact that a promoter of a product does not claim that the product will work for every consumer does not absolve the promoter from liability under 39 U.S.C. 3005 where, as the Postal Service Judicial Officer found here, the promotional materials suggest that the product will produce beneficial results for a substantial percentage of consumers.

This begs the issue, however, of what the Complaint actually stated. If the

Postal Service had meant "may" instead of "will", surely it would have used that word in the Complaint and not claimed for the first time in the District Court that it meant something other than what the Complaint stated.

The Court of Appeals also found that the overall impression of the materials was that the products will cause regrowth of hair and will stop hair loss, finding it immaterial that disclaimers and expressions of skepticism were present in the materials. Even the Court of Appeals acknowledged, however, that the materials did not represent that the products will work for all people (App., p. 13).

Without citing any authority, the Court of Appeals held that the Judicial Officer was free to ignore the testimony

of Petitioner's expert and form his own conclusions as to what representations were made by the material. This holding ignores the reality of the testimony of the expert. The Court of Appeals, again without citing any authority, held that the Postal Service was free to ignore the testimony of the lay witnesses who were in the group of consumers to whom Petitioner's products were directed.

Petitioner submits that the District Court correctly applied the law to the facts of this case in undertaking its review of whether substantial evidence supported the Postal Service decision. The Court of Appeals, without undertaking a de novo review of the facts in the case as it alleged it had done, simply held that the Judicial Officer could decide for himself the import of

Petitioner's materials and was free to ignore the relevant, competent, admissible evidence to the contrary. Petitioner submits that the Court of Appeals clearly committed error in reversing the District Court on this issue.

Petitioner believes that under Supreme Court Rule 17, the right of both the Judicial Officer and the Court of Appeals to ignore competent and relevant evidence in favor of reaching their own unfounded decision presents an important issue which has, to the best of Petitioner's knowledge, not been settled by this Court but should be settled by this Court.

C. Evidence on Falsity

The only witness offered by the Postal Service at the hearing was Dr. Karl

Kramer, a Miami, Florida dermatologist who testified that, in his expert opinion, the products will not cause the regrowth of hair on bald heads or stop hair loss in balding men. His opinion was not based upon any actual experience with the products, but was based upon what he believed to be the consensus of informed medical opinion. Based upon his testimony alone, the Judicial Officer determined that the representations alleged in the Complaint, having been found by him to be made, were false.

The District Court noted that the Judicial Officer correctly found that Dr. Kramer's testimony established the consensus of informed medical opinion and that this was prima facie evidence

that New Generation will not stop excessive fallout or cause the regrowth of hair in balding males (App., p. 35) the Court then noted that the burden fell to produce some rebuttal evidence in order to eliminate the prima facie presumption, again citing F.R.E. 301.

The District Court found that Petitioner had successfully defeated the prima facie presumption by presenting five pieces of evidence (App., pp. 37-38):

> First, they elicited testimony from Dr. Kramer that ... Polysorbate 60 may dissolve di-hydrotestosterone (DHT), which Dr. Kramer testified is currently thought to cause (male pattern baldness), in the follicular canal and scalp. (A.R. 114-115, 120-124, 143-144). ... Second, CPR presented the controlled Setala/Schreck-Purola studies testing the effects of Polysorbate 60 on hair growth. ... Third, although not required to admit such testimony, 39 CFR 952.18(f), numerous law witnesses testified as to New Generation efficacy, and this evidence was considered by both the ALJ and the Judicial Officer. A.R. 992, 737-740.

* * *

The fourth piece of evidence ... was photographic. The AL admitted, and the Judicial Officer considered, photographs of five lay witnesses apparently showing a regrowth of hair. See A.R. 712-714, 715-719. ... Finally, the number of complaints received by the USPS about a product can constitute some evidence of its efficacy. USPS v. Stimpson, 515 F. Supp. 1149, 1151 (D. Fla., 1981). ... In the present case there is no evidence that, after over 6,000 orders, a single complaint has been received by the USPS about New Generation.

The Court concluded (App. pp. 42-43):

Considering these five pieces of evidence together, the Court finds that the Judicial Officer erred as a matter of law in finding that (Petitioner) did not sufficiently rebut the presumption raised by Dr. Kramer's initial testimony. (Citn. omitted) At this point, the prima facie presumption disappeared and the burden of proof remained with the USPS to show that New Generation is not effective in ameliorating MPB. Id. This burden was not met because, on rebuttal testimony, Dr. Kramer acknowledged the results represented. A.R. 120-124, 143-144. Thus, substantial evidence does not support the Judicial Officer's finding that New Generation's representations are in fact false.

The Court of Appeals completely ignored the well-reasoned analysis of the District Court. It simply stated that Dr. Kramer's opinion as to the consensus of informed medical opinion constituted, in and of itself, substantial evidence to support the Postal Service finding that Petitioner's representations were false, citing Research Laboratories, Inc. v. United States, 167 F.2d 410, 416-417 (9th Cir., 1948). That case is, however, inapposite here.

That case was a civil seizure brought pursuant to the provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301, et seq. In such a case, the standard of proof is by a preponderance of the evidence, not substantial evidence as it is here. Thus, evidence that may have been sufficient to support a conclusion in an FDA civil seizure action is not necessarily sufficient to support a conclusion of substantial evidence in a

Postal Service case.

As the District Court pointed out (App., p. 43) the standard for determining factual issues under the Food, Drug and Cosmetic Act is different from that under the Postal Service statutes. As contrasted with the new drug provisions of the Food, Drug and Cosmetic Act, 21 U.S.C. 321(p) and 355, where the absence of objective tests is sufficient to demonstrate the ineffectiveness of a drug, the District Court correctly pointed out that it is the burden of the Postal Service in USPS cases to show the product's ineffectiveness. The District Court noted that this holding was especially significant in light of this Court's decision in Reilly v. Pinkus, 338 U.S. 269 (1949).

The Court of Appeals also determined that Dr. Kramer's testimony was substantial evidence notwithstanding the anecdotal and testimonial evidence offered by various users of appellee's products, citing Simeon Management Corp. v. FTC, 579 F.2d 1137, 1143-44 (9th Cir., 1978). However, the reference in the Simeon case is to the Food, Drug and Cosmetic new drug standards which, as the District Court pointed out, are not the standards applicable to Postal Service cases.

The Court of Appeals, again relying on the Research Laboratories case, stated that in light of Dr. Kramer's testimony with respect to the informed medical consensus, the Postal Service was not required to present evidence of clinical

tests of Petitioner's products. As pointed out above, the Research Laboratories case is inapposite here.

Furthermore, the Court of Appeals decision totally ignores the District Court's discussion of certain evidence and that evidence itself in evaluating the findings of the Postal Service. The Court of Appeals gives only passing attention to the testimony of the users, all of whom the District Court found to have male pattern baldness (App., p. 38) and competent to testify as to hair regrowth (App., p. 39). The District Court further noted Dr. Kramer's testimony that he knew of no study which has found a placebo effect occurring in male pattern baldness (Id.) The Court of Appeals also paid no attention to the photographic evidence.

Most importantly, the Court of Appeals ignored the District Court's discussion of burden of proof and the distinction between the burden of going forward and the burden of proof. Petitioner submits that the District Court was correct in its analysis of the factual evidence and that the Court of Appeals was clearly incorrect.

An important question, to date unanswered by this Court, is what proof need be presented by the Postal Service in a case brought pursuant to 39 U.S.C. 3005 to support a finding that a representation is false in fact. This statute does not deal with standards of general recognition of and adequate and well-controlled investigations as does the Food, Drug and Cosmetic Act, supra.

Concomitant with this issue is what is the burden of proof as distinguished from the burden of going forward in these cases, and at what point, and with what type of evidence, does the prima facie presumption end and cause the Postal Service to present evidence of actual ineffectiveness as opposed to theoretical ineffectiveness.

There are extremely important issues that have not been, but should be, settled by this Court. See, Sup. Ct. Rule 17. Thus, these issues are ripe for a determination by this Court on this Petition for a Writ of Certiorari, and the Petition should be granted. Petitioner respectfully requests that this Petition be granted and this case be heard on its merits.

APPENDIX

The Appendix to this Petition,

consisting of the two Postal Service decisions and the two court decisions is filed herewith.

Dated: October 3, 1986

Respectfully submitted,

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